(2) Supreme Court, U.S.
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No. _____

# IN THE SUPREME COURT OF THE UNITED STATES

JALIL ABDUL MUNTAQIM, A/K/A ANTHONY BOTTOM,

*Petitioner*,

v.

PHILLIP COOMBE, ANTHONY ANNUCCI, LOUIS F. MANN,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

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Jalil Abdul Muntaqim, a/k/a Anthony Bottom,

Petitioner,

v.

Phillip Coombe, Anthony Annucci, Louis F. Mann,

Respondents.

**SUPPLEMENTAL APPENDIX TO**
**PETITION FOR A WRIT OF CERTIORARI**

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## STATEMENT ON SUPPLEMENTAL APPENDIX

At the direction of the Clerk of the Court, two supplemental appendices are included herein: (1) the report and recommendation of the United States Magistrate Judge in this case; and (2) a recent order of the Eleventh Circuit, *Johnson v. Governor of Florida*, No. 02-14469, --- F.3d --- (11th Cir. July 20, 2004), granting rehearing *en banc* and vacating that court's panel opinion. The Eleventh Circuit's panel opinion in *Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), is one of the cases cited by Petitioner to demonstrate the division among and between the Circuits on the questions for which he seeks a grant of certiorari. Petitioner was not aware of the Eleventh Circuit's order when he filed his brief in support of this petition.

## SUPPLEMENTAL APPENDICES

Page

Report and Recommendation of United States Magistrate Judge Gustave J. Di Bianco of the United States District Court for the Northern District of New York (July 18, 2000) ..... 1a

Order of the United States Court of Appeals for the Eleventh Circuit in *Johnson v. Governor of Florida*, (July 20, 2004) .....16a

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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JALIL ABDUL MUNTAQIM, a/k/a
ANTHONY BOTTOM,

Plaintiff,

vs. 94-CV-1237
(J. Mordue)

PHILIP COOMBE; ANTHONY
ANNUCCI; LOUIS F. MANN,

Defendants.

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## REPORT-RECOMMENDATION

This matter has been referred to the undersigned for Report and Recommendation by the Honorable Norman A. Mordue, United States District Judge, pursuant to 28 U.S.C. § 636(b) and Local Rules N.D.N.Y. 72.3(c).

In the instant civil rights complaint, plaintiff alleges that the New York statutes governing "civil death," the disenfranchisement of felons, and the award of "good time credits" are unconstitutional. Plaintiff seeks declaratory, injunctive, and monetary relief.

Presently before the court is defendants' motion for summary judgment pursuant to FED. R. CIV. P. 56. Plaintiff has responded in opposition to the motion. For the following reasons, the undersigned agrees with defendants and will recommend dismissal of the complaint.

## DISCUSSION

### 1. Summary Judgment

Summary judgment may be granted when the moving party carries its burden of showing the absence of a genuine issue of material fact. FED. R. CIV. P. 56; *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir. 1990) (citations omitted). "Ambiguities or inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the summary judgment motion." *Id.* However, when the moving party has met its burden, the nonmoving party must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). At that point, the nonmoving party must

move forward with specific facts showing that there is a genuine issue for trial. *Id.*

**2. Facts**

Plaintiff alleges that because he is a "lifer," he has been prevented from voting in state and federal elections pursuant to N.Y. ELECT. LAW § 5-106 which denies the right to vote to those individuals convicted of felonies. Plaintiff claims that section 5-106 violates the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965. Plaintiff also alleges that New York State Civil Rights Law § 79(a) which provides that a person sentenced to life imprisonment is considered civilly dead is discriminatory. Plaintiff then states that if he is to be declared "civilly dead" then his family should be entitled to federal benefits as if plaintiff were dead.

Plaintiff also challenges N.Y. CORRECT. LAW §§ 803 and 805. Plaintiff claims that section 803 violates equal protection because it excludes inmates sentenced to life imprisonment from the ability to accumulate good time credits. Plaintiff alleges that section 805 is unconstitutional because it prevents inmates who are serving a minimum sentence of more than six years from participating in the Earned Eligibility Program.

**2. Elections Law**

The Elections Law in New York State provides that

> 2. No person who has been convicted of a felony pursuant to the laws or this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum

> sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

N.Y. ELECT. LAW § 5-106(2). The Voting Rights Act of 1965 (VRA) prohibits qualifications or prerequisites to voting that are based upon race or that "result in" a denial or abridgement of the right of any citizen to vote. 42 U.S.C. § 1973(a). Section 1973(b) provides that a violation of the statute is established if, based on the totality of the circumstances, it is shown that the political processes that lead to nomination or election to political office are not equally open to participation by members of the protected class of citizens in subsection (a), in that the members of the protected class have less opportunity that other members of the electorate to participate in the political process and to elect representatives of their choice. *Id.* § 1973(b).

Felon disenfranchisement statutes such as section 5-106 have been the subject of prior litigation. In the Second Circuit, a group of inmates brought a challenge to section 5-106, alleging violations of both the 14th and 15th Amendments and the Voting Rights Act. The district court initially dismissed their action *sua sponte*. *Baker v. Cuomo*, 842 F. Supp. 718 (S.D.N.Y. 1993)(*Baker I*). A panel of the Second Circuit reversed the district court's decision, finding that although plaintiffs had not sufficiently stated claims under the 14th and 15th Amendments, the plaintiffs did state a claim under the VRA. *Baker v. Cuomo*, 58 F.3d 814 (2d Cir.), *cert. denied*, 516 U.S. 980 (1995)(*Baker II*). The panel reaffirmed its decision in a denial of rehearing *Baker v. Cuomo*, 58 F.3d at 824-25 (*Baker III*), and granted rehearing

*en banc* only with respect to the Voting Rights claim. *Baker v. Cuomo*, 67 F.3d 39 (2d Cir. 1995)(*Baker IV*).

The *en banc* court was evenly divided on whether the inmates stated a claim under the VRA. *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996)(*Baker V*). The effect of this was to uphold the decision of the district court which had dismissed plaintiffs' claims, but *Baker V* does not have any precedential value itself. *See Farrakhan v. Locke*, 987 F. Supp. 1304, 1309 n.3 (E.D. Wash. 1997). The Eastern District of Washington has held that inmates may state a claim under the VRA. *Farrakhan v. Locke*, 987 F. Supp. at 1304, 1307-14. The Eastern District of Virginia considered a constitutional challenge to Virginia's disenfranchisement statute and found, without considering the VRA, that plaintiffs did not state a claim under the Equal Protection Clause of the Fourteenth Amendment. *Perry v. Beamer*, 933 F. Supp. 556 (E.D. Va.), *aff'd*, 99 F.3d 1130 (4th Cir. 1996).

This court agrees with the judges in *Baker* who found that the VRA did not apply to the New York felon disenfranchisement statute. In *Richardson v. Ramirez*, 418 U.S. 24, 55-56 (1974), a pre-VRA case, the Supreme Court held that the disenfranchisement of ex-felons did not violate the Equal Protection Clause of the Fourteenth Amendment. Specifically, the court in *Richardson* cited section 2 of the Fourteenth Amendment as a basis for finding disenfranchisement constitutional. *Id.* at 54. Section 2 of the Fourteenth Amendment provides that if the right to vote is denied to any of the male inhabitants of a state who are over twenty one years of age "***or in any way abridged, except for participation in rebellion, or other crime,***" the basis of representation shall be reduced proportionately. U.S. CONST. amend. XIV, § 2. This section clearly implies that the denial of the right to vote to felons is authorized and anticipated since the denial of this right to felons will not bring about the sanction of reduced representation.

The question then becomes whether the VRA applies to felon disenfranchisement statutes notwithstanding their constitutional validity if the disenfranchisement statute "results" in the denial or abridgement of a citizen's right to vote based upon race. As stated by the five judges of the Second Circuit who voted against the application of the VRA to section 5-106, the "results test" of the VRA was enacted pursuant to its authority under the enforcement provisions of the Fourteenth and Fifteenth Amendments. *Baker*, 85 F.3d at 926. The Fourteenth and Fifteenth Amendments themselves may be violated only by intentional action, but the VRA reaches conduct, not directly violative of the constitution, but which "results in" the denial of the right to vote based upon race. *Id.* at 926-27.

The VRA applies to "tests or devices" that impose restrictions or requirements on the right to vote. *Id.* at 925 n.8 (citing 42 U.S.C. § 1973(4)(c)). The VRA contains a number of provisions, some of which are applicable to only certain jurisdictions that had traditionally employed certain tests or voter qualifications on various enumerated dates. *Id.* at 924-25 (citing 42 U.S.C. § 1973b(b)). The act also contains a number of provisions that apply to all jurisdictions, and as ***originally enacted***, section 1973 barred the imposition of voter qualifications, such as literacy tests, or other procedures, neutral on their faces, that were prerequisites to voting, but denied the right to vote based on race if the motivation for their use was discriminatory. *Id.* at 925 (citing *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980)).

The VRA was amended in 1982 to prohibit any "'voting qualification or prerequisite to voting or standard, practice, or procedure ... which *results* in a denial or abridgement of the right of any citizen ... to vote on account of race or color,'" without the requirement of a discriminatory motive.

*Id.* at 926 (omissions in original)(citing *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986)).

The court in *Baker* cited cases in which sections of the VRA were held to prohibit certain state practices. *Id.* at 927 (citing *inter alia*, *Katzenbach v. Morgan* 384 U.S. 641 (1966)). In *Katzenbach*, the Supreme Court determined that section 1973b(e) was constitutional in its provision that no person who had successfully completed the sixth grade in a school in which the predominant language was something other than English could be denied the right to vote. *Id.* The court stated that although the section of the VRA was phrased in general terms, it was enacted for the purpose of dealing with the disenfranchisement of large segments of the Puerto Rican population in New York. *Id.*

The VRA has also been held to prohibit certain state durational residency requirements and other literacy tests. *Baker*, 85 F.3d at 927 (citing *Oregon v. Mitchell*, 400 U.S. 112. (1970)). The five members of the court in *Baker* then found that the proposed application of section 1973 to section 5-106 could not find support in any of the previously cited Supreme Court cases dealing with the VRA. The court stated that although the Supreme Court had upheld nationwide bans on certain state practices, those bans addressed specific disfavored practices that "perpetuated historical discrimination of an unconstitutional kind." 85 F.3d at 928. In a footnote, the Second Circuit noted that it was unclear that "as a general rule" the "'results' methodology" of section 1973 is constitutionally valid because the Supreme Court had never authorized this methodology in furtherance of the enforcement of the Fourteenth and Fifteenth Amendments. *Id.* at 928 n.12.

The court in *Baker* then stated that unlike the practices at which the VRA was aimed, the practice of depriving felons of the right to vote was a widespread historical practice,

existing prior to the passage of the Civil War Amendments. *Id.* at 928. The five judges then reasoned that the

> prevalence of this practice prior to the passage of the Civil War Amendments indicates that felon disenfranchisement was not an attempt to evade the requirements of the Civil War Amendments or to perpetuate racial discrimination forbidden by those amendments.

*Id.* However, the court did note that prior to 1890, no southern state required proof of literacy, understanding of the constitution, or good moral character as prerequisites to voting, but those "tests and devices" were shortly to appear in most of the states with large African American populations. *Id.* at 929. Clearly, the point of this discussion was to show that felon disenfranchisement was in existence before the racial minority was afforded the right to vote and that therefore, the purpose of the statutes was not to disenfranchise African Americans or other minorities. Instead, the judges of the Second Circuit noted that felon disenfranchisement statutes were generally enacted for "compelling, nondiscriminatory reasons," and were not subject to the risk of discriminatory application and the possibility of fraudulent manipulation that characterized the tests mentioned above *Id.* at 929-30.

The five judges then stated that any attempt by Congress to subject the felon disenfranchisement statutes to the "results" methodology of section 1973 would "pose a serious constitutional question concerning the scope of Congress' power to enforce the Fourteenth and Fifteenth Amendments." 85 F.2d at 930. The judges also stated that if through a statute, Congress intends to "alter the 'usual constitutional balance between the States and the Federal Government, it must make its intention to do so

'unmistakably clear in the language of the statute.'" *Id.* at 931 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991)). Finding that the application of section 1973 to state felon disenfranchisement statutes would "undermine the constitutional balance between the federal and state governments," the judges reasoned that a clear statement by Congress was necessary. *Id.*

The five judges reasoned that this application would undermine the balance because the states have the primary responsibility for regulating the time, place, and manner of conducting federal elections as well as the more obvious responsibility for regulating state elections. *Id.* (citation omitted). Additionally, although the Civil War Amendments and the VRA significantly intrude upon the states' authority in certain circumstances where discriminatory practices are apparent, these provisions were enacted against a setting in which felon disenfranchisement statutes had a long history and were specifically recognized as valid in the Fourteenth Amendment. *Id.* The judges also stated that insofar as disenfranchisement was a penalty for violating the criminal law, traditionally, the states had the responsibility for fashioning appropriate punishments. *Id.*

The judges stated that an ***explicit*** constitutional balance has been struck by the mandate in the Fourteenth Amendment that the adverse consequences of reduced congressional representation would not result from the enforcement of felon disenfranchisement statutes. *Id.* Thus, if Congress were to upset that balance, a clear statement in the statute would be required. The court in *Farrakhan* disagreed with this interpretation, finding that the enforcement provisions of the Civil War Amendments to the Constitution had already changed the "usual constitutional balance" between the states and the federal government, allowing Congress to police states for violations of the constitutional rights of racial minorities. 987 F. Supp. at

1309. The court reasoned that because the amendments had already altered the federal-state balance as contemplated by the ***original constitution***, the "plain statement" rule was "simply inapplicable" to the VRA. *Id.*

If this interpretation were correct, then the "plain statement" rule would never apply to legislation enacted to enforce the Fourteenth Amendment. However, in *Gregory v. Ashcroft*, 501 U.S. at 470, the Supreme Court held that the "plain statement rule" would apply regardless of whether the legislation was enacted pursuant to the Commerce Clause power or section 5 of the Fourteenth Amendment. The judges of the Second Circuit who supported the application of the VRA to felon disenfranchisement statutes cited *Chisom v. Roemer*, 501 U.S. 380 (1991) for the proposition that the "plain statement" rule does not apply to the VRA. *Baker*, 85 F.3d at 938 (Feinberg, Newman, Meskill, Kearse, and Parker).

*Chisom* was a case in which the issue was whether the VRA applied by its own terms to judicial elections since section 2(b) referred to violations of the act being shown when protected citizens had less opportunity than other members of the electorate to participate in the political process and to elect ***representatives*** of their choice. 501 U.S. 295-96. The court did not use the term "plain statement," nor did it apply the "plain statement" rule, however, the court reasoned that judicial elections were included in the reach of the VRA prior to the 1982 amendments, and if Congress had intended to so limit the reach of the VRA it would have made it explicit in the statute or would have discussed the issue in the "extensive legislative history" of the 1982 amendment, particularly when the rest of the amendment was enlarging the reach of the VRA. 501 U.S. at 391-396. In view of the factual circumstances in *Chisom*, the fact that the "plain statement" rule was not mentioned or applied does not indicate that the rule would never be applicable to section

1973, given *Gregory's* clear statement that the rule would apply to challenge legislation enacted under the Fourteenth Amendment.

One court has held that the VRA does apply to felon disenfranchisement statutes, but that plaintiffs could not state a claim for a violation of the VRA based upon the factors that the court must consider under the statute. *See Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986). *Wesley* has been criticized as a misinterpretation of the VRA, requiring a higher standard of proof from plaintiffs than the standard contemplated by the Act. *See Farrakhan*, 987 F. Supp. at 1312-13. Although the court in *Wesley* considered the possible disproportionate number of non-white felons, the court also found that a factor to consider was the social goal justifying the disenfranchisement of felons and the theory that those individuals who choose to violate society's rules should not be allowed to participate in their promulgation. 791 F.2d at 1261-62. The *Wesley* court cited the Second Circuit's decision in *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) as support for this proposition. *Id.*

In his memorandum of law, plaintiff also states that section 5-106 is inconsistent with the New York State Constitutional section providing for equal protection of the law and inconsistent with the section providing that the vote will not be denied based on race. Section 5-106 does not deny the right to vote based upon race, but upon conviction of a felony, and the New York State Constitution is not inconsistent as argued by plaintiff.

This court need not reach this issue because of its finding that the VRA does not apply to section 5-106. Thus, plaintiff's claim under the VRA must be dismissed.

**3. Civil Death Statute**

Plaintiff also alleges that section 79-a of the New York Civil Rights Law is unconstitutional because it renders him unable to contract or engage in business transactions. First, as the defendants point out, section 79-a refers only to marriage contracts, and second, this section has already been held unconstitutional by Senior Judge McCurn in *Langone v. Coughlin*, 712 F. Supp. 1061 (N.D.N.Y. 1989). Plaintiff does not allege that he wishes to marry, but he argues that the civil death statute prevents him from forming other contracts and incorporating a business.

It is not section 79-a that prevents inmates in general from conducting a business while incarcerated. The court would point out that it is a disciplinary violation for any inmate to solicit goods or services from any business or person without prior approval. N.Y. COMP. CODES R. & REGS. tit. 7, § 270.2, Institutional Rule of Conduct # 103.20. Other than plaintiff's statement that he attempted to "incorporate," and was refused, plaintiff does not mention any other "contracts" that he has not been able to form.

Plaintiff also alleges that given his "civil death" pursuant to section 79-a, his spouse and children should be able to receive federal benefits as if he were dead. Again, section 79-a deals only with marriage contracts, whereas the receipt of federal benefits is governed by 42 U.S.C. §§ 402 and 423. As defendants point out, 42 U.S.C. § 402(x) governs limitations on payments to prisoners. This section provides that benefits shall not be paid to those incarcerated for felonies, however, benefits to which a non-incarcerated individual would be entitled based upon the wages or income of the confined individual would still be payable. *Id.* § 402(x)(2). Thus, if plaintiff's "family" were entitled to some benefits based upon plaintiff's wages or income, they might be entitled to federal benefits.

However, the defendants also correctly point out that federal benefits are governed by federal law, and the civil death statute does not extend past New York law. Plaintiff is not "dead" for purposes of federal law. Additionally, if plaintiff's dependents were entitled to benefits that they were not receiving, they would have to challenge the receipt of the benefits through the administrative process available to them. *See* 42 U.S.C. § 405. Finally, plaintiff does not allege that his dependents would be entitled to federal benefits based upon his "death," nor does he indicate that he has any dependents to whom benefits would be paid.[1] Thus, plaintiff's challenge to section 79-a is first, moot as to marriage, and second has no merit regarding plaintiff's allegation that he cannot form other "contracts" or obtain benefits for his dependents based on his "civil death."

**4. Good Time Credits and Earned Eligibility Program**

Plaintiff's final claim is that he has been denied equal protection because as a lifer, he has been excluded from the opportunity to earn good time credits and from participation in the Earned Eligibility Program. In *Curtis v. Pataki,* 96-CV-425, 1997 WL 614285 (N.D.N.Y. Oct. 1, 1997), Judge Rosemary S. Pooler affirmed a report-recommendation by the undersigned, deciding the issue of good time credits for inmates with life sentences. Essentially, then-District Judge Pooler[2] held that inmates serving life sentences are not a suspect classification and the legislature's decision to grant certain inmates good time "'is a matter of legislative grace' and does not create a fundamental right." 1997 WL 614285

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[1] Defendants submitted the affidavit of Corrections Counselor William Fulton who states that there are no marriage licenses on file for plaintiff. He has apparently had two common law wives, neither of which have any contact with plaintiff. The records indicate that plaintiff has one child of majority age and apparently one grandchild. (Docket # 36).

[2] Judge Pooler has since been appointed to the Second Circuit Court of Appeals.

at *3 (citing *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997); *People ex rel. McNeil v. New York State Board of Parole*, 57 A.D. 2d 876, 394 N.Y.S. 2d 230, 232 (2d Dep't 1977)). Based on the above, the decision not to grant good time credits to inmates with life sentences need only be rationally related to a legitimate government interest. *Id.* (citing *Nicholas v. Tucker*, 114 F.3d at 20). The court found that this decision was rationally related to administrative convenience[3] and stated that the legislature was entitled to assume that judges would give maximum sentences to those who committed the most heinous crimes and were the least deserving of early release. *Id.*

The above rationale applies with equal force to plaintiff's claim that he is not entitled to participate in the Earned Eligibility Program in New York State Corrections Law § 805. By its terms section 805 does not apply to inmates serving a minimum sentence of more than six years. Section 805 provides that those individuals with minimum terms of six years or less and have been issued certificates of earned eligibility shall be granted parole at the expiration of their minimum terms, "unless the board of parole determines that there is a reasonable probability that, that if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society." N.Y. CORRECT. LAW § 805.

It is rational to exclude those inmates serving life sentences from a program designed for early release. Plaintiff argues that state officials themselves advocate for changes in the law, lending support to his claim that the law is invalid. However, the fact that New York State decides to change a law or not change a law does not bear on its ultimate constitutionality if the law is constitutional in the

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[3] Deducting good time from a life sentence is obviously impracticable.

first instance. If New York chooses to change the good time statute or the Earned Eligibility Program, it is clearly within the State's prerogative to do. The job of the federal court is not to oversee the wisdom of the Department of Corrections or the New York State legislature, but only to protect the constitutional rights of individuals. If the law does not violate any constitutional provisions, this court must refrain from commenting upon its benefit or lack thereof on the prison population.

**WHEREFORE,** based on the findings above, it is

**RECOMMENDED,** that the defendants' motion for summary judgment (docket # 34) be **GRANTED,** and the complaint **DISMISSED.**

Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72, 6(a), 6(e).

/s/

Dated: July 18, 2000 United States Magistrate Judge

United States Court of Appeals,
Eleventh Circuit.

Thomas JOHNSON, Derrick Andre Thomas, Eric Robinson, Adam Hernandez, Kathryn Williams-Carpenter, Jau'Dohn Hicks, John Hanes, in their own right and as representatives of all ex-felon citizens of Florida, Plaintiffs-Appellants,
Omali Yeshitela, Plaintiff,
v.
GOVERNOR OF THE STATE OF FLORIDA, Jeb Bush, Secretary of the State of Florida, Katherine Harris, Charlie Crist, Robert Milligan, William Nelson, Robert Crawford, Thomas Gallagher, in their roles as members of the Clemency Board of Florida, Beverly Hill, Alachua County Election Supervisor, et al., Defendants-Appellees.

**No. 02-14469.**

July 20, 2004.

Jessie Allen, Deborah Goldberg, New York City, for Plaintiffs-Appellants.

Charles J. Cooper, David H. Thompson, Hamish Hume, Derek L. Shaffer, Cooper & Kirk, PLLC, Washington, DC, Robert C. Buschel, Buschel, Carter, Schwartzreich & Yates, Michael David Cirullo, Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, FL, H. Ray Allen, III, Tampa, FL, for Defendants-Appellees.

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Charles S. Treat, San Francisco, CA, for Seven Nonprofit Public Interest Organizations.

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Appeal from the United States District Court for the Southern District of Florida (No. 00-03542-CV-JLK); James Lawrence King, Judge.

(Opinion Dec. 19, 2003, 353 F.3d 1287, 11th Cir.2003).

Before EDMONDSON, Chief Judge, and TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, WILSON and PRYOR, Circuit Judges.[1]

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[1] Judge Stanley Marcus has recused himself and will not participate. Judge Phyllis A. Kravitch has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. § 46(c).

BY THE COURT:

A member of this Court in active service having requested a poll on the suggestion of rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this Court en banc. The previous panel's opinion is hereby VACATED.